



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 10 OF 2021

MATHRITA MORAA KING'ARI

[Suing as a personal representative of the estate of the late

MICHAEL NYANGENA NYARIKI (Deceased).....APPLICANT

VERSUS

JANIFFER MORAA ANYONA.....1ST RESPONDENT

ABEL MOCHUMBE ONSONGO.....2ND RESPONDENT

ESTHER NDUNKU ONSONGO.....3RD RESPONDENT

REUBEN MAROKO OMARI.....4TH RESPONDENT

FRANCIS OKEYO BINYANYA.....5TH RESPONDENT

RULING

1. By a Notice of Motion dated 11th August, 2021 the Applicant sought leave to file an Appeal out of time against the Judgment delivered on 12th May 2020 in KISII CMCC NO. 163 OF 2018 by Honourable S.N MAKILA SRM. The Applicant also sought injunctive orders for purposes of maintaining the status quo pending the hearing and determination of the intended Appeal.

2. The application is based on the grounds set out on the face of the application as well as the Supporting Affidavit sworn by Elijah Bitange Mageto the Applicant's Counsel.

2. Mr. Mageto averred that the impugned Judgment in the subordinate court was delivered on 12th May, 2020 in the absence of the parties. He contended that the Judgment was set to be delivered on 27th March, 2020 but the same was not delivered on that date since there were no court sessions on 27th March, 2020 as Chief Justice had ordered for suspension of open court sessions all over the country as a containment measure to curb the spread of Covid-19.

4. He deponed that the court was expected to issue notices to the parties informing them of the new date set for the delivery of the Judgment but the same did not happen and thus the judgment was delivered in the absence of the parties. He lamented that since the delivery of the Judgment was done in the absence of the parties, the Applicant was denied an opportunity to file an Appeal within the prescribed time of 30 days.

5. He averred that the failure to serve the Judgment notices as required had occasioned prejudice and injustice to the Applicant. It was his deposition that the application for leave has been filed without inordinate delay from the date when the Applicant learnt of the delivery of the Judgment. He deponed that the Applicant came to learn of the Judgment on 21st July, 2021 after her former advocate, Mr. Ombachi who had written letters to the court without any response, approached the Executive Officer to inquire about the status of the file. He then [perused the file and discovered that a judgment had been delivered on 12th May, 2020.

6. Mr. Mageto deponed that by the time the Applicant was able to get a certified copy of the Judgment and the proceedings in the trial court, the time for filing an Appeal had elapsed hence this application. He expressed fears that the Respondents had threatened to sell the deceased's land known as **LR NO. WEST BOGEKA/3348** (hereinafter referred to as "the suit property") which was the subject matter of

proceedings in the subordinate court.

7. He deponed that the Applicant had informed him that on 2nd August, 2021 the 1st Respondent had taken a prospective buyer to the suit property to view it with the intention of buying it and she was apprehensive that if it was sold, she would be rendered homeless and her Appeal would also be rendered nugatory.

8. The Respondents filed a Replying Affidavit sworn by Janiffer Moraa Anyona, the 1st Respondent herein on 30th August 2021 opposing the application. The 1st Respondent averred that the Applicant was not in occupation or possession of the suit property.

9. She averred that the Applicant had not explained the inordinate delay of one year and three months after the delivery of the Judgment on 12th, May, 2020.

10. She further averred that the Applicant went to slumber and never bothered to follow up on the progress of her case. It was her averment that the purported inquiries made by the Applicant's Advocate were false since the letters were neither never paid for nor received by the court to enable it act on them.

11. It was her further averment that the Applicant's claim that the 1st Respondent intended to sell the suit property to third parties was a mere allegation without any proof. She reiterated that the suit property was still in the name of a deceased person and hence none of the Respondents had the *locus standi* to sell the same to third parties and pass good title.

12. It was her strong belief that the Appeal had no chances of success since the same was based on a customary law practice that is unconstitutional and thus the court should dismiss the application.

13. In response to the 1st Respondent's Replying Affidavit filed on behalf of the Respondents, the Applicant filed a Supplementary Affidavit sworn on 10th September, 2021. In the said Affidavit, the Applicant averred that it was not true as averred by the 1st Respondent that she was not in occupation of the suit property during the pendency of the suit in the lower court as she was illegally evicted from the suit property (matrimonial home) by the Respondents on 2nd February, 2020 in defiance of the status quo order that had been issued by the lower court.

14. She explained that it was as a result of the illegal eviction that she had amended her plaint to incorporate a prayer for mandatory injunction for reinstatement. She reiterated that in her current application she sought maintenance of status quo pending the hearing and determination of intended appeal and the issue of whether she was in possession of the suit property during the pendency of the case in the lower court was irrelevant.

15. She contended that her application for injunction was not untenable because this court is vested with jurisdiction under Article 162 of the Constitution of Kenya and order 42 rule 6 of the Civil Procedure Rules to maintain status quo in order to prevent wastage and/or alienation of the subject matter pending Appeal so that the Appeal is not rendered nugatory.

16. She denied the allegation by the Respondents that the Judgment was delivered online and stated that the said claim was not backed by evidence. The Applicant accused the Respondents of failing to appreciate her predicament yet they were aware that operations were affected by the declaration of the COVID-19 Pandemic. She reiterated that she never went to slumber because no notice of delivery of judgment was ever served upon her or her Advocate.

17. The Applicant averred that contrary to the averments of the 1st Respondent, no payment is required for delivery of a letter of inquiry sent to the court inquiring about the status of a file in the court.

18. The Applicant averred that she had personally seen the 1st Respondent showing the suit property to a prospective buyer with a view to selling the same. She contended that the issue of *locus standi* does not arise because the Respondents have always sold their land with a promise of transferring the same after the Grant of Letters of Administration is issued.

19. The Applicant averred that her intended Appeal is not unconstitutional since she has a constitutional right to appeal against a decision made by the lower court. She contended that grave marriages are not unconstitutional as alleged by the Respondents and challenged the Respondent to prove the inconsistency.

20. The Court directed that the application be argued by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

21. Having considered the history of this case, the ruling of the lower court, the application as well as the submissions of counsel for both parties, the sole issue that arises for determination is whether the Applicant has met the requirements for leave to appeal out of time against the ruling of the lower court delivered on 12th May 2020.

ANALYSIS AND DETERMINATION

22. Order 50 Rule 6 of the Civil Procedure Rules grant the courts unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules. In the case of **Fakir Mohamed V. Joseph Mugambi & 2 Others [2005] eKLR** the Court of Appeal stated that:-

“The exercise of this court’s discretion ... is unfettered. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration the competence of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors.”

23. Furthermore, in the cases of **Leo Sila Mutiso V. Hellen Wangari Mwangi [1999] 2EA 231 Niazsons (K) Ltd V. China Road and Bridge Corporation (Kenya) [2002] eKLR** it was reiterated that the power to enlarge time for appealing is discretionary and that the discretion must be exercised judicially considering the length of delay, the explanation for it, and chances (possibly) of appeal succeeding and degree of prejudice to the respondent as reiterated in **Mwangi V. Kenya Airways Ltd [2003] KLR 486**.

24. The delay in the instant case is one year and three months. The Applicants’ explanation is that the Judgment of the subordinate court was delivered on 12th May, 2020 in the absence of the parties. He averred that the said Judgment was set to be delivered on 27th March, 2020 but the same was not delivered on that date as the Chief Justice had ordered the suspension of all open court sessions as a containment measure to curb the spread of covid-19. She argued that the court was expected to issue notices to the parties informing them of the new date set for the delivery of the Judgment but the same did not happen. She equally argued that since the delivery of the Judgment was done in the absence of the parties and without notices being issued, the Applicant was denied an opportunity to file an Appeal within the prescribed time of 30 days.

25. To further explain the efforts she made in following up on the progress of her case, she annexed copies of letters written by her advocate inquiring about the status of the matter.

26. I find that the explanation given by the Applicant regarding the delay is satisfactory. I say so because it is evident that the lower court did not issue notices to the parties that it would deliver the Judgment through Zoom on 12th May, 2021 since it was unable to deliver the same on 27th March, 2021. I am equally satisfied by the efforts made by the Applicant to ensure that she got the judgment that was delivered in her absence and in the absence of the Respondents. I also can’t fail to take judicial notice of the Covid-19 Pandemic that affected court operations and caused confusion to the litigants who ended up stranded without knowing how their cases were progressing. Further the Respondents have not demonstrated that they will suffer prejudice if the Applicant is allowed to lodge her Appeal.

27. In the final result, it is my finding that the application is merited and the same is allowed with costs to the Respondents. The Appeal shall be filed within 21 days.

28. In order to prevent the Applicant’s intended Appeal from being rendered a nugatory, the status quo obtaining at the date of this ruling shall be maintained. This means that the Respondents shall continue using the suit property but they shall not transfer, charge or alienate the same pending the hearing and determination of the Appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF OCTOBER, 2021

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J.M ONYANGO

JUDGE